Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-435 OF 2010
ABDUL MALIK ISHAK, KANG HWEE GEE AND ABDUL WAHAB PATAIL JJCA
15 SEPTEMBER 2010

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Arbitration — Arbitration proceedings — Final award — Award against subsidiary of appellant — Appellant not party — Whether award could be enforced against appellant — Whether unjust and abuse of court process

D

Companies and Corporations — Separate legal entity — Lifting the veil of incorporation — Circumstances when corporate veil may be pierced — Enforcement of final arbitral award — Whether appellant alter ego of subsidiary — Whether appellant personally liable for acts and liabilities of subsidiary — Whether enforcement of final award against appellant justified

E

Equity — Estoppel — Estoppel by election — Dispute between subsidiary of appellant and respondents — Respondents sought to impose benefits of final award against appellant — Whether general rule of estoppel by election applied — Proper application of estoppel by election principles

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The appellant was appealing against the decision of the High Court in dismissing their application to strike out the respondents' suits. In the above case, the respondents had entered into five different agreements with a company known as TNB Transmission Network Sdn Bhd ('TNBT'), a subsidiary of the appellant. The appellant and TNBT then instituted a civil action against the respondents in the Shah Alam High Court seeking, inter alia, the release of its equipments that were stored at the respondents' warehouse. The respondents obtained an order to stay the original suit and to refer the disputes to arbitration arising under the five agreements but confined itself to the disputes between the respondents and TNBT. Thus, the appellant was excluded from the arbitration proceedings and the appellant's action against the respondents under the original suit was stayed. The arbitration was duly concluded and the final award which was in favour of the respondents was registered in the Kuala Lumpur High Court. Armed with that arbitration award, the respondents instituted the present suit against the appellant claiming, inter alia, the sum of RM106,888,499.34 to be paid by the appellant to the first respondent as set out in the final award; and the sum of RM6,102,922.50 to be paid by the appellant to the second respondent as set

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out in the final award. The respondents contended that the appellant is and was at all material times the controlling and directing mind, the alter ego of and the party who has the effective control of TNBT, and that the veil of incorporation of TNBT must, in the interest of justice be lifted to hold the appellant personally liable for the acts and liabilities of TNBT. The appellant however, submitted that even if the allegations by the respondents were correct, no reasonable cause of action was disclosed in the respondents' statement of claim. Further, the arbitration proceedings and award were between the respondents and TNBT and not the appellant.

Held, allowing the appeal with costs:

(1) It was crystal clear that the existing cause of action was against TNBT, a subsidiary, but the respondents were seeking to impose liability on the appellant, the holding company. This was untenable in the circumstances of the case. One cannot simply raise the veil of incorporation just because he feels that it was in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all (see paras 48–49).

(2) The suggestion by the respondents that the appellant had used TNBT since its inception as a contracting vehicle to commit fraud, if true (the appellant had denied it vehemently), then the respondents would have been aware of the alleged fraud at the time the five agreements entered into or at the latest, at the time when the original suit was filed. Yet the respondents had elected to affirm the validity of the five agreements and pursued the matter by way of an arbitration proceedings against TNBT solely (see para 52).

(3) To allow the respondents to enforce the final award against the appellant would be unjust and an abuse of the process of the court. The trial judge made a wrong finding when he held that TNBT was used by the appellant to 'evade liability' without the benefit of oral evidence. The particulars of fraud in the appeal record were nothing more than a mere rehash of what the respondents already knew namely, that TNBT was involved. The respondents registered the award of the arbitrator against TNBT before the High Court (see paras 53–54).

(4) If the appellant was held liable to make payment to the respondents for the award against TNBT then the rule in *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22 will be relegated into oblivion. The facts of the present appeal do not permit the court to depart from the rule in *Salomon*'s case. Unless the statute states otherwise, the principle that the separate legal entities with all the rights and liabilities would normally attach to separate legal entities cannot be overlooked (see paras 62–63).

(5) Since the appellant was not a party to the arbitration proceedings, the appellant was not present and he did not participate in those proceedings. The appellant cannot therefore be asked to pay for the final award handed down by the arbitrator. There was a clear breach of natural justice. The opportunity to be heard normally calls for an oral hearing and such hearings are modelled along the lines employed by the courts. This was not accorded to the appellant for the simple reason that the appellant was not a party to the arbitration proceedings (see paras 80–81).

[Bahasa Malaysia summary

Perayu di dalam kes ini merayu terhadap keputusan Mahkamah Tinggi dalam menolak permohonan mereka untuk membatalkan guaman responden-responden. Di dalam kes ini responden-responden telah memasuki lima perjanjian yang berbeza dengan syarikat yang dikenali sebagai TNB Transmission Network Sdn Bhd ('TNBT'), anak syarikat perayu. Perayu dan TNBT kemudian memulakan tindakan sivil terhadap responden-responden di Mahkamah Tinggi Shah Alam memohon, antara lain, pelepasan barangannya yang disimpan di gudang responden-responden. Responden-responden memperoleh perintah penggantungan dalam tindakan asal dan untuk merujuk pertikaian tersebut kepada timbang tara yang berbangkit di bawah lima perjanjian tersebut tetapi mengehadkan dirinya kepada pertikaian di antara responden-responden dan TNBT. Oleh itu perayu dikecualikan daripada prosiding timbang tara dan tindakan perayu terhadap responden-responden di bawah tindakan asal digantung. Timbang tara ditamatkan dan award akhir yang memihak kepada responden-responden didaftarkan di Mahkamah Tinggi Kuala Lumpur. Berdasarkan kepada award timbang tara tersebut, responden-responden memulakan tindakan ini terhadap perayu memohon, antara lain, jumlah sebanyak RM106,888,499.34 dibayar oleh perayu kepada responden pertama seperti yang disebut di dalam award akhir timbang tara; dan jumlah RM6,102,922.50 dibayar oleh perayu kepada responden kedua seperti yang terdapat di dalam award akhir. Responden-responden menghujah bahawa perayu masih dan telah pada kesemua masa material pihak yang mengawal, mempunyai kuasa, alter ego dan pihak yang mempunyai kawalan efektif terhadap TNBT, dan bahawa tabir penubuhan TNBT mesti, dalam kepentingan keadilan dibuka untuk memutuskan bahawa perayu bertanggungjawab secara peribadi untuk tindakan-tindakan dan liabiliti TNBT. Perayu walau bagaimanapun, berhujah bahawa walaupun dakwaan-dakwaan oleh responden-responden adalah betul, tidak ada kausa tindakan yang munasabah didedahkan di dalam penyataan tuntutan responden-responden. Selanjutnya, prosiding timbang tara dan award adalah di antara responden-responden dan TNBT dan bukan perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah amat jelas bahawa kausa tindakan yang wujud adalah terhadap

TNBT, sebuah anak syarikat, tetapi responden-responden memohon untuk meletakkan tanggungjawab ke atas perayu, syarikat induk. Ini tidak boleh dipertahankan di dalam keadaan kes. Seseorang tidak boleh sewenang-wenangnya membuka tabir penubuhan hanya kerana dia berpendapat bahawa ia adalah dalam kepentingan keadilan. Tetapi jika terdapat fraud, maka tabir penubuhan boleh dibuka, Tetapi di sini, tidak ada fraud langsung (lihat perenggan 48–49).

(2) Saranan oleh responden-responden bahawa perayu telah menggunakan TNBT semenjak penubuhannya sebagai alat untuk memasuki kontrak untuk melakukan fraud, jika benar, (perayu menafikan secara keras), maka responden-responden akan menyedari tentang fraud tersebut pada masa lima perjanjian dimasuki atau sekurang-kurangnya, pada masa tindakan asal difailkan. Tetapi responden-responden memilih untuk mengesahkan kesahan kelima-lima perjanjian dan meneruskan dengan perkara tersebut secara prosiding timbang tara terhadap TNBT sahaja (lihat perenggan 52).

(3) Untuk membenarkan responden-responden melaksanakan award akhir terhadap perayu akan menjadi tidak adil dan penyalahgunaan proses mahkamah. Hakim bicara membuat penemuan yang salah apabila beliau memutuskan bahawa TNBT digunakan oleh perayu untuk 'evade liability' tanpa faedah keterangan lisan. Butir-butir fraud di dalam rekod rayuan adalah tidak lebih daripada olahan semula semata-mata tentang apa yang responden-responden telah tahu iaitu bahawa TNBT terlibat. Responden-responden mendaftarkan award timbang tara terhadap TNBT di Mahkamah Tinggi (lihat perenggan 53–54).

(4) Jika perayu dikatakan bertanggungjawab untuk melakukan bayaran kepada responden-responden untuk award terhadap TNBT maka peraturan di dalam *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22 akan diketepikan sehingga dilupakan. Fakta rayuan ini tidak membenarkan mahkamah menyimpang daripada prinsip di dalam kes *Salomon*. Kecuali jika statut menyatakan sebaliknya, prinsip bahawa entiti undang-undang yang berasingan dengan kesemua hak-hak dan liabiliti akan selalunya terikat kepada entiti undang-undang yang berasingan tidak boleh diendahkan (lihat perenggan 62–63).

(5) Oleh kerana perayu bukan pihak kepada prosiding timbang tara, perayu tidak hadir dan tidak mengambil bahagian di dalam prosiding tersebut. Perayu oleh itu tidak boleh disuruh membayar untuk award akhir yang diberikan oleh penimbang tara. Terdapat kemungkiran jelas keadilan semula jadi. Peluang untuk didengar selalunya adalah untuk pendengaran lisan dan pendengaran sedemikian diasaskan secara yang digariskan oleh mahkamah. Ini tidak diberikan kepada perayu atas alasan mudah bahawa perayu bukan pihak kepada prosiding timbang tara (lihat perenggan 80–81).]

Notes

For a case on estoppel by election, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) para 2850.

For cases on arbitration generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1176–1570.

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 758–782.

Cases referred to

Abdul Rahim bin Aki lwn Krubong Industrial Park (Melaka) Sdn Bhd & lain-lain [1995] 2 MLJ 130, HC (refd)

Adams and others v Cape Industries plc and another [1991] 1 All ER 929, Ch D (refd)

Aron Salomon (Pauper) v A Salomon and Company, Limited [1897] AC 22, HL (folld)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors [1985] 2 MLJ 236, HC (refd)

Banque des Marchands de Moscou (Koupetschesky) v Kindersley and another [1951] Ch 112; [1950] 2 All ER 549, CA (refd)

Barnes & Co Ltd v Sharpe (1910) 11 CLR 462 (refd)

Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145, FC (refd)

Catherine Lee v Lee's Air Farming Ltd [1961] AC 12 (refd)

Charles Osenton and Company v Johnston [1942] AC 130, HL (refd)

Chi Liung & Son Ltd, Re; Tong Chong Fah v Tong Lee Hwa & Ors [1968] 1 MLJ 97, HC (refd)

Chong Chin Kee v Lee Song & Anor [1961] MLJ 76, CA (refd)

Chong Siew Choong v PP [1996] 5 MLJ 65, HC (refd)

Development & Commercial Bank Bhd v Lam Chuan Company & Anor [1989] 1 MLJ 318, HC (refd)

Ernst & Young v Maxbiz Corp Bhd [2009] 1 MLJ 206; [2008] 6 CLJ 136, CA (refd)

Evans v Bartlam [1937] 2 All ER 646, HL (refd)

Ex parte Robertson, In re Morton (1875) LR 20 Eq 733 (refd)

Fletcher's Settlement Trusts, Medley, Re v Fletcher [1936] 2 All ER 236, Ch D (refd)

Goh Hooi Yin v Lim Teong Ghee & Ors [1977] 2 MLJ 26, HC (refd)

Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189, SC (refd)

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498; [1998] 3 CLJ 253, CA (refd)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109, HC (refd)
John Shaw and Sons (Salford), Limited v Peter Shaw and John Shaw [1935] 2 KB 113, CA (refd)
Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513, FC (refd)
King, The v Taylor, The King v Amendt [1915] 2 KB 593 (refd)
Koh Hoe Peng v Central Development Ltd [1983] 1 MLJ 274, CA (refd)
Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor [1974] 2 MLJ 83, PC (refd)
Lam Shes Tong & Ors v Lam Kee Ying Sdn Bhd [1973] 1 MLJ 203, FC (refd)
Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors [1999] 3 MLJ 481, CA (refd)
Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd [1996] MLJU 275; [1998] 3 CLJ Supp 450, HC (refd)
Lissenden v CAV Bosch, Limited [1940] AC 412; [1940] 1 All ER 425, HL (refd)
Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners; Same v McGregor (Inspector of Taxes) [1969] 1 WLR 1241; [1969] 3 All ER 855, CA (refd)
MBF Holdings Bhd v Emtex Corporation Bhd [1986] 1 MLJ 477, SC (refd)
Malayan Banking Berhad v International Tin Council and another appeal [1989] 3 MLJ 286, SC (refd)
Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359, SC (refd)
Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7; [1985] 1 CLJ 20, PC (refd)
Mills v Duckworth [1938] 1 All ER 318, CA (refd)
Nagubai Ammal & Ors v B Shama Rao & Ors AIR 1956 SC 593, SC (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215, HC (refd)
Pacific Internet Ltd v Catcha.com Pte Ltd [2000] 3 SLR 26, HC (refd)
Pek Seng Co Pte Ltd & Ors v Low Tin Kee & Ors [1990] 1 MLJ 75, HC (refd)
People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors [1986] 1 MLJ 68, HC (refd)
Perbadanan Pembangunan Bandar v Syabas Holdings Sdn Bhd [1990] 2 MLJ 116, HC (refd)
Pilba Trading & Agency v South East Asia Insurance Bhd & Anor [1998] 2 MLJ 53, HC (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
Rosenfeld v Newman and others [1953] 2 All ER 885; [1953] 1 WLR 1135, CA (refd)
Rubber Improvement Ltd and another v Daily Telegraph Ltd, Same v Associated Newspapers Ltd [1964] AC 234, HL (refd)

Salvage Engineers Limited, Re [1962] MLJ 438, HC (refd)
Sheffield and South Yorkshire Permanent Building Society in liquidation, In re the (1889) 22 QBD 470 (refd)
Slough Estates Ltd v Slough Borough Council and another (No 2) [1969] 2 Ch 305; [1969] 2 All ER 988, CA (refd)
South Hetton Coal Company, Limited v North-Eastern News Association, Limited [1894] 1 QB 133; [1891–94] All ER Rep 548; (1894) 10 TLR 110, CA (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529; [1997] 1 AMR 1, FC (distd)
Tan Ah Tong v Perwira Affin Bank Bhd & Ors [2002] 5 MLJ 49; [2001] 7 CLJ 500, HC (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487, HC (refd)
Tan Lai v Mohamed bin Mahmud & Ors [1982] 1 MLJ 338, HC (refd)
Tan Tien Kok v Medical Specialist Centre (JB) Sdn Bhd [1994] 3 MLJ 469, HC (refd)
Tinkler v Hilder (1849) 4 Exch 187 (refd)
United Australia, Limited v Barclays Bank, Limited [1941] AC 1; [1940] 4 All ER 20, HL (refd)
Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited [1921] 2 KB 608, CA (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672, CA (refd)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714; [1993] 1 BLJ 35, SC (distd)

Legislation referred to

Arbitration Act 1952 s 6
Companies Act 1965 s 16, 16(5)
Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

Appeal from: Suit No D-22NCC-183 of 2009 (High Court, Kuala Lumpur)

Robert Lazar (Rodney Gomez with him) (Shearn Delamore & Co) for the appellant.
Wong Chong Wah (Lim Koon Huan with him) (Skrine) for the respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] By way of a summons in chambers, the appellant ('TNB') filed an application to strike out the respondents' writ of summons and the statement of claim dated 30 September 2009 against the appellant (TNB) pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court.

[2] The appellant's (TNB's) application was heard by the learned judge of the High Court and His Lordship dismissed the appellant's (TNB's) application with costs. The appellant (TNB) was also ordered to pay the respondents' fixed costs of RM10,000. His Lordship too ordered an early trial.

[3] Aggrieved by that decision, the appellant (TNB) now appeals to this court.

STRIKING OUT UNDER O 18 R 19(1) OF THE RHC

[4] The courts have a discretionary power to strike out an action summarily in the following instances:

(a) in plain and obvious cases (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC));

(b) where the plaintiffs'/respondents' suit is an abuse of the process of the court (*Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145 (FC)); and

(c) when the plaintiffs'/respondents' claim cannot be maintained in law and the court possesses an inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC)).

[5] The same legal principles on striking out can be seen in the following cases:

(a) *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498; [1998] 3 CLJ 253 (CA);

(b) *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2002] 5 MLJ 49; [2001] 7 CLJ 500 (HC);

(c) *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 (HC);

(d) *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26 (HC); and

(e) *Ernst & Young v Maxbiz Corp Bhd* [2009] 1 MLJ 206; [2008] 6 CLJ 136 (CA).

[6] We are aware that an appellate court will not interfere with the exercise of discretion by the judge in chambers unless it is clear that the judge's discretion was wrongly exercised. This simple proposition of law can be distilled from the following cases:

(a) *Evans v Bartlam* [1937] 2 All ER 646 (HL) at p 650, per Lord Atkin:

> Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it.

(b) *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (PC) at p 229, per Lord Guest:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton and Company v Johnston* [1942] AC 130 per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473). Upon questions of procedure the board is slow to interfere with the discretion exercised by a local court (*The Mayor, Alderman, and Citizens of the City of Montreal v Thomas Storrow Brown and James K Springle (Commissioners in Re Expropriation of St Joseph Street)* (1876) 2 App Cas 168).

(c) *Charles Osenton and Company v Johnston* [1942] AC 130 (HL) at p 138, per Viscount Simon LC:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

[7] We categorically say that an application to strike out, like the present case at hand, should be dealt with before a trial. Indeed this is the view of the Federal Court in *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* as seen in the judgment of Zulkefli Ahmad Makinuddin FCJ at p 150 where His Lordship said:

> But such an application must be refused after the action has been set down for trial.

[8] And contrary to settled law, the learned judge of the High Court refused to consider the merits of the application to strike out filed by the appellant (TNB) and His Lordship preferred to deal with it at the trial proper. It is our judgment, that the merits of the striking out application filed by the appellant (TNB) should be considered by the learned judge of the High Court forthwith and not to delay it any further.

THE BRIEF BACKGROUND FACTS

[9] Within a short compass, the facts may be stated as follows.

[10] The respondents entered into five different agreements with a company known as TNB Transmission Network Sdn Bhd ('TNBT') between the years 2001–2002 (the 'five agreements'). TNBT was a subsidiary of the appellant (TNB).

[11] The appellant (TNB) and TNBT then instituted a civil action against the respondents in the Shah Alam High Court vide Civil Suit No MT3-22–323 of 2004 (the 'original suit') in relation to the five agreements. The appellant (TNB) in the original suit sought for the release of its equipments that were stored at the respondents' warehouse.

[12] The respondents then applied to stay the original suit pursuant to s 6 of the Arbitration Act 1952. The respondents succeeded in obtaining an order (the 'order') dated 23 March 2005 to stay the original suit and to refer to arbitration the disputes arising under the five agreements but confining itself to the disputes between the respondents and TNBT. The effect of that order was this. That the appellant (TNB) was excluded from the arbitration proceedings and the appellant's (TNB's) action against the respondents under the original suit was stayed.

[13] The arbitration between the respondents and TNBT was duly concluded and the final award by the arbitrator was published on 3 October 2007. The final award favoured the respondents as opposed to TNBT. And the final award was registered on 22 July 2009 in the Kuala Lumpur High Court vide Civil Suit No R2(R4)–24–80 of 2007.

[14] Armed with that arbitration award, the respondents now instituted the present suit against the appellant (TNB) claiming the following prayers:

(a) the sum of RM106,888,499.34 to be paid by the appellant (TNB) to the first respondent as set out in the final award;

(b) the sum of RM6,102,922.50 to be paid by the appellant (TNB) to the second respondent as set out in the final award;

(c) the respondents further claimed for:

(i) accrued interest on the final award at 8%pa from 19 April 2004 on the amounts due in (a)–(b) respectively to the date of full payment;

(ii) costs of the arbitration amounting to RM75,095.50;

(iii) costs awarded by the High Court in Kuala Lumpur High Court Originating Motion No R4–25-336 of 2007 in the sum of RM10,000;

(iv) costs awarded by the High Court in Kuala Lumpur High Court Originating Summons No R2(R4)–24–80 of 2007 in the sum of RM2,000;

(v) costs of these proceedings; and

(vi) further and other relief as this honourable court deems fit and just.

ANALYSIS

[15] Learned counsel for the respondents argued that the appellant (TNB) was now trying to avoid or evade its liability to pay an arbitration award dated 3 October 2007 handed down by the arbitrator.

[16] Learned counsel for the respondents further argued that the appellant (TNB) is and was at all material times the controlling and directing mind, the alter ego of and the party who has the effective control of TNBT, and that the veil of incorporation of TNBT must, in the interest of justice be lifted to hold the appellant (TNB) personally liable for the acts and liabilities of TNBT.

[17] Learned counsel for the respondents also argued that the learned judge of the High Court was correct when His Lordship held that the respondents, prima facie has an arguable case against the appellant (TNB) and that it was obvious from the facts of the case that the respondents' case against the appellant (TNB) was obviously sustainable and that the pleadings filed herein disclosed some cause of action or raised some question fit to be decided by His Lordship.

[18] Learned counsel for the respondents submitted that the appeal ought to be dismissed with costs for the following reasons:

(a) that the respondents have a valid, reasonable and legitimate cause of action against the appellant (TNB);

(b) that the respondents' current High Court suit against the appellant (TNB) and the arbitration are separate and distinct from each other and that the issue of estoppel or election would not apply;

(c) that there was substantial evidence of the appellant's (TNB's) involvement, participation and control over its wholly owned subsidiary — TNBT, in every aspect of TNBT's actions, activities and decisions;

(d) that the appellant (TNB) has committed fraud against the respondents by using TNBT as its contracting vehicle to pursue its rights and interests and at the same time conveniently disclaimed all liabilities accruing therefrom; and

(e) that there was no basis for the appellant's (TNB's) argument that they were 'shut out' from the arbitration process when in actual fact the appellant (TNB) had been actively involved in all stages of the arbitration proceedings and that would include the registration of the final award as well as the failed attempt to set aside or remit the final award.

[19] By way of a rebuttal, learned counsel for the appellant (TNB) submitted that even if the allegations by the respondents were correct, no reasonable cause of action was disclosed in the respondents' statement of claim.

[20] We will now proceed to examine the statement of claim. We observed that paras 24, 27, 31, 38, 40 and 47 of the statement of claim set out the five agreements. These five agreements showed that the respondents' contracts were with TNBT — the appellant's (TNB's) wholly owned subsidiary. The five agreements were not contracts between the respondents and the appellant (TNB).

[21] To compound the matter further, the arbitration proceedings were between the respondents and TNBT only. The appellant (TNB) was not involved.

[22] We noticed that para 4 of the statement of claim was worded erroneously in this way:

> The plaintiffs' claim (referring to the respondents) against the defendant (referring to the appellant) is for an unpaid Award sum based on an arbitration award given by the learned Arbitrator …

[23] In reality, the arbitration award was against TNBT and not the appellant (TNB).

[24] The sting of the respondents' claim against the appellant (TNB) can be seen at paras 53–54 of the statement of claim. It is in these paragraphs that the respondents pleaded that the appellant (TNB) and its subsidiary TNBT operated as one economic unit. What the respondents were trying to convey was this. That TNBT and the appellant (TNB) are one and the same entity.

And because of this, the respondents alleged that the appellant (TNB) is the alter ego of TNBT and, consequently, the veil of incorporation must be lifted. A

[25] The English Court of Appeal in *Adams and others v Cape Industries plc and another* [1991] 1 All ER 929, considered extensively the single economic unit argument. Slade LJ delivering the judgment of the English Court of Appeal (with a coram of Slade, Mustill and Ralph Gibson LJJ) aptly said at p 1016: B

> The 'single economic unit' argument
>
> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities': *The Albazero; owners of the cargo lately laden on board the ship or vessel Albacruz v Owners of the ship or vessel Albazero* [1977] AC 774 at p 807; [1975] 3 All ER 21 at p 28, per Roskill LJ. C D
>
> It is thus indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities. Mr Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and NAAC rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities. E

[26] Continuing at p 1019, Slade LJ had this to say: F

> Mr Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray Le Quesne submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22; [1895–99] All ER Rep 33 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities. G H

[27] Continuing further at p 1021, Slade LJ said in trenchant terms: I

> In the light of the set up and operations of the Cape group and of the relationship between Cape/Capasco and NAAC we see the attraction of the approach adopted by Lord Denning MR in the *DHN* case [1976] 3 All ER 462 at p 467; [1976] 1 WLR 852 at p 860 which Mr Morison urged us to adopt:

This group is virtually the same as a partnership in which all the three partners are companies.

In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J that the observations of Robert Goff LJ in *Note Bank of Tokyo Ltd v Karoon and another* [1987] AC 45 at p 64; [1986] 3 All ER 468 at p 486 are apposite:

Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.

[28] Finally, in regard to the lifting of the veil of incorporation, Slade LJ approached it in this way (see p 1026 of the report):

Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of *AMC* to which special considerations apply) to expect that the court would apply the principle of *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22; [1895–99] All ER Rep 33 in the ordinary way.

[29] It is the registrar of companies who, under s 16 of the Companies Act 1965, is authorised to register a company and based on the memorandum and articles of the company, the registrar of companies will issue a certificate of the company's incorporation. According to the case of *Tan Lai v Mohamed bin Mahmud & Ors* [1982] 1 MLJ 338, the effect of these acts by the registrar of companies would create a 'body corporate' capable forthwith of exercising the functions of an incorporated company. To put it differently, from the date of incorporation as specified in the certificate of incorporation, the subscribers to the memorandum together with such other persons as may from time to time become members, the company will be a body corporate based on the name as contained in the memorandum.

[30] Section 16(5) of the Companies Act 1965 explains the effect of incorporation. Upon incorporation, a company will be capable of exercising all the functions of an incorporated company. The company will have perpetual succession and a common seal with the necessary power to hold land but with commensurate liability on the part of the members to contribute to the assets of the company in the event the company is being wound up as is provided for in the Companies Act 1965 (*Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* [1999] 3 MLJ 481 (CA) and *Abdul Rahim bin Aki lwn Krubong Industrial Park (Melaka) Sdn Bhd & lain-lain* [1995] 2 MLJ 130). It is trite that one of the most important effects of incorporation is this. That the company can sue and be sued in its corporate name (*People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68).

[31] This court in *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* made reference to the case of *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22 (HL) and to the case of *Catherine Lee v Lee's Air Farming Ltd* [1961] AC 12 and said at p 486:

> In addition to the statutory effects of incorporation, there is also a fundamental difference between an incorporated and an unincorporated association, in that an incorporated association has a legal personality of its own apart from the persons who comprise it. The separate legal personality of a company is not specifically provided for in the Companies Act. Nevertheless, the whole scheme of the Act is predicated upon the company's separate existence. … This is elementary law.

[32] It must be borne in mind that there may be several people joining together to form a company, yet upon incorporation, a company becomes 'a body corporate' with perpetual succession. Upon incorporation, a company assumes a legal status of its own and becomes an entity independent of or distinct from its members and directors. This is the basic principle that every lawyer should know. It has been repeated in a number of cases, namely:

(a) *Re Chi Liung & Son Ltd; Tong Chong Fah v Tong Lee Hwa & Ors* [1968] 1 MLJ 97;

(b) *Development & Commercial Bank Bhd v Lam Chuan Company & Anor* [1989] 1 MLJ 318;

(c) *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26;

(d) *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236; and

(e) *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714 (SC).

[33] According to the case of *John Shaw and Sons (Salford), Limited v Peter Shaw and John Shaw* [1935] 2 KB 113, a company is an entity distinct from its shareholders and directors. And according to *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53, a company is also distinct from its employees.

[34] But the effects of incorporation as set out in s 16(5) of the Companies Act 1965 are not exhaustive. It does not mention the fundamental difference between an incorporated and an unincorporated association in that an incorporated association has a legal personality of its own apart from the persons who comprise it.

[35] The Companies Act 1965 do not specifically provide for the separate legal personality of a company. Notwithstanding such drawback, it is appropriate to state that the whole scheme of the Companies Act 1965 is predicated upon the company's separate existence. It is the classic case of *Salomon* that establishes the separate legal personality of a company.

[36] The law may be stated as follows:

(a) once a certificate of incorporation has been issued by the registrar of companies, a company becomes a body corporate or better known as a corporation;

(b) a company can be defamed (*South Hetton Coal Company, Limited v North-Eastern News Association, Limited* [1894] 1 QB 133; [1891–94] All ER Rep 548; (1894) 10 TLR 110 (CA); and *Barnes & Co Ltd v Sharpe* (1910) 11 CLR 462);

(c) but a company cannot claim damages for injury to its feelings (*Rubber Improvement Ltd and another v Daily Telegraph Ltd, Same v Associated Newspapers Ltd* [1964] AC 234 (HL) at p 262);

(d) a company is a separate legal entity distinct from its members or directors (*Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 at p 543; [1997] 1 AMR 1 (FC) at p 11);

(e) a company is a 'legal persona just as much as an individual' (per Cave J in *In re the Sheffield and South Yorkshire Permanent Building Society in liquidation* (1889) 22 QBD 470 at p 476); and

(f) by the process of the law, a company can be dissolved.

[37] At this juncture, it is ideal to narrate the relevant facts of the *Salomon* case.

[38] Aron Salomon had for many years carried on a prosperous business as a leather merchant and wholesale boot manufacturer trading on his sole account. In 1892 he decided to convert the business into a limited company. And for this purpose, 'Aron Salomon and Company, Limited' was formed with liability limited by shares. The memorandum of the company was subscribed by Aron Salomon, his wife and five of his children. It was all along the intention of these persons to retain the business in their own hands. The company purchased the business for £39,000 and the price was satisfied by: (a) a sum amounting to £20,000 was paid to Aron Salomon who immediately returned the money to the company in exchange for the fully paid shares; (b) a sum amounting to £10,000 was paid in debentures for the like amount; and (c) the balance sum, with the exception of about £1,000 which Aron Salomon seemed to have received and retained, went in discharge of the debts and liabilities of the business at the time of purchase. The end result was this. That apart from the fully paid shares, Aron Salomon received for his business about £1,000 in cash and £10,000 in debentures. A year after its incorporation, the company became insolvent and went into liquidation. In an action brought by a debenture holder on behalf of himself and all the other debenture holders, the company set out by way of counterclaim, inter alia, that the company was a mere nominee and agent of Aron Salomon and that the company or the liquidator was entitled to be indemnified by Aron Salomon against all the debts owing by the company to the creditors other than Aron Salomon himself. The main issue before the court was whether the debenture originally issued to Aron Salomon was valid and therefore ranked in priority to unsecured creditors.

[39] Vaughan Williams J, the judge of the first instance, held that the company was only an 'alias' or an 'agent' for Aron Salomon and because of that Aron Salomon was personally bound to pay the unsecured creditors of the company. The Court of Appeal affirmed the decision of Vaughan Williams J but on different ground. The Court of Appeal considered the relation between the parties as trustee and cestui que trust. This difference of view did not affect the conclusion that the right of the indemnity claimed had been established against Aron Salomon.

[40] But the House of Lords unanimously reversed the decision of the Court of Appeal and held that Aron Salomon was not personally liable. Lord Macnaghten said (see p 51 of the report):

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

[41] Earlier on at pp 50–51, Lord Macnaghten had this to say:

> There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lord Justices seems to think, or that there should be anything like a balance of power in the constitution of the company.

[42] Lord Halsbury LC in *Salomon*'s case at p 31 treated the company as a creature of statute and that what was done by Salomon was within the intention of the Legislature as manifested by the statute. Thus, while the business was managed solely by Salomon, in law he and the company were separate persons. This separateness is an incident of the incorporation of a company notwithstanding that only one person effectively owns and controls it.

[43] In a nutshell, the rule in *Salomon*'s case laid down this classic principle of law. A company and the individual or individuals forming a company are separate legal entities, however complete the control might be by one or more of these individuals over the company. And *Salomon*'s case has been referred to in a number of cases, namely:

(a) *Perbadanan Pembangunan Bandar v Syabas Holdings Sdn Bhd* [1990] 2 MLJ 116;

(b) *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109;

(c) *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 (SC);

(d) *Lam Shes Tong & Ors v Lam Kee Ying Sdn Bhd* [1973] 1 MLJ 203 (FC);

(e) *Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor* [1974] 2 MLJ 83 (PC);

(f) *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714 (SC);

(g) *Tan Tien Kok v Medical Specialist Centre (JB) Sdn Bhd* [1994] 3 MLJ 469;

(h) *Chong Chin Kee v Lee Song & Anor* [1961] MLJ 76 (CA);

(i) *Re Salvage Engineers Limited* [1962] MLJ 438;

(j) *Koh Hoe Peng v Central Development Ltd* [1983] 1 MLJ 274 (CA);

(k) *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359 (SC);

(l) *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236;

(m) *MBF Holdings Bhd v Emtex Corporation Bhd* [1986] 1 MLJ 477;

(n) *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (SC);

(o) *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286 (SC);

(p) *Pek Seng Co Pte Ltd & Ors v Low Tin Kee & Ors* [1990] 1 MLJ 75;

(q) *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487;

(r) *Chong Siew Choong v Public Prosecutor* [1996] 5 MLJ 65;

(s) *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533;

(t) *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513 (FC);

(u) *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* ; and

(v) *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors*.

[44] The argument that the veil of incorporation of TNBT must, in the interest of justice, be lifted was applied by this court in *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355. Gopal Sri Ram JCA (later FCJ) speaking for this court had this to say at pp 362–363 (CLJ):

> In my judgment, in the light of the more recent authorities such as *Adams and others v Cape Industries plc and another* [1990] Ch 433 it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The former, that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22, the seminal case on the subject. For, this was what the Lord Chancellor said:
>
> I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence? Quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

A good illustration of equitable fraud as a ground for piercing or disregarding the corporate veil is *Jones and another v Lipman and another* [1962] 1 All ER 442. In that case, the first defendant after agreeing to sell his property to the plaintiffs for £5,250 sold and transferred it to a company of which he and his solicitors' clerk were shareholders and directors for £3,000. The plaintiffs sued for and obtained a decree of specific performance against the company of which Russell J (later Lord Russel of Killowen) said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity … an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529, Chong Siew Fai CJ (Sabah and Sarawak) said that in:

> cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

His Lordship was there, of course, referring to the legal basis upon which judicial intervention has occurred in cases such as *Jones and another v Lipman and another*.

In the present appeal, it is not the plaintiffs' case that special circumstances exist here indicating that Boltex is a mere facade concealing the true facts. Nor was a case of actual or equitable fraud raised on the pleading. It is therefore of no avail to the plaintiffs to say without more that this is a case for piercing the corporate veil. They simply did not lay any evidential foundation to support that plea. On the basis of current authority there is therefore no justification whatsoever in law to pierce the corporate veil of Boltex for the purpose of treating its property as the property of the second to the sixth defendants.

[45] Learned counsel for the respondents argued that the respondents' cause of action in the present suit against the appellant (TNB) is entirely distinct and separate from the arbitration and the Shah Alam suit. The stand of the respondents was this. That the appellant (TNB) is legally responsible for the payment of the final award to the respondents. It was argued that once the corporate veil of TNBT was lifted it would show that the appellant (TNB) had, inter alia, fraudulently used TNBT as its contracting vehicle in all its dealings with the respondents.

[46] Learned counsel for the respondents relied on the case of *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529 (FC), particularly to a passage in the judgment of Chong Siew Fai CJ (Sabah and Sarawak) at p 543 (MLJ) and p 537 (CLJ):

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established

since *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22 (HL). However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

[47] Reference to the Supreme Court case of *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714; [1993] 1 BLJ 35, was also made by learned counsel for the respondents. The following passages in the judgment of Peh Swee Chin SCJ at p 726 (MLJ) and p 43 (BLJ) were referred to:

The categories of purposes for which the court will lift the veil is never closed. A court has always the discretion to have a crack at it to do justice.

It will be argued that to do justice will involve doing justice to an accused person whose liberty is imperilled and whose innocence is presumed until proven guilty. However the legal position is far more intricate than this simple argument suggests.

All the cases for which the courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against the third parties or outsiders to the companies in question who have or would have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc.

[48] With respect, *Sunrise Sdn Bhd* and *Yap Sing Hock* can readily be distinguished. The plaintiffs in those two cases clearly had an existing cause of action against the holding company. Here, in the instant appeal, it is crystal clear that the existing cause of action was against TNBT — a subsidiary, but the respondents are now seeking to impose liability on the appellant (TNB) — the holding company, and this is untenable in the circumstances of the case.

[49] You cannot simply raise the veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.

[50] Paragraph 54 of the respondents' statement of claim at p 74 of the appeal record at *Jilid* 1 states that the appellant (TNB) is the directing mind of TNBT. With respect, that averment is insufficient to trigger the lifting of the veil of incorporation. And right from the very beginning the respondents said that the appellant (TNB) played a prominent role. This cannot be right because the five agreements were contracts between the respondents and TNBT. There was thus no veil to be lifted. Everything was there to be seen and appreciated. Nothing was hidden. Everything was transparent.

[51] At para 56 of the statement of claim at p 74 of the appeal record at *Jilid* 1, the respondents pleaded what they said to be fraud. However, the word 'fraud' does not mean anything more than what is stated. When you plead fraud, the particulars must be pleaded. Since there was no liability on the part of the appellant (TNB) to pay the award handed down by the arbitrator, then the plea of fraud must necessarily fail. When fraud has been pleaded, that warrants a strict scrutiny of the pleadings. Here, on the facts, there was no fraud at all. In *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672, this court said that 'mere general allegations of fraud are insufficient to constitute a pleaded case of fraud'. For completeness, we shall reproduce verbatim the judgment of Gopal Sri Ram JCA (later FCJ) as reflected at p 677 of the report:

> In my judgment the learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable. Both principle and authority favour her decision. First the principle. It is to be found in s 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly pointed out by the learned judge, mere general allegations of fraud are insufficient to constitute a pleaded case of fraud. As Lord Hatherley said in *John Wallingford v The Directors, & C, of the Mutual Society, and the official liquidator thereof* (1880) 5 App Cas 685:
>
> > There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[52] Now, at para 56 of the statement of claim at p 74 of the appeal record at *Jilid* 1, the respondents suggested that the appellant (TNB) had used TNBT since its inception as a contracting vehicle to commit fraud. If such allegations were true (the appellant (TNB) here has denied it vehemently), then the respondents would have been aware of the alleged fraud at the time the five agreements were entered or at the latest at the time when the original suit was filed. Yet the respondents had elected to affirm the validity of the five agreements and pursue the matter by way of an arbitration proceeding against TNBT solely.

[53] We are of the view that to allow the respondents to enforce the final award against the appellant (TNB) would be unjust and an abuse of the process of the court. The learned judge of the High Court made a wrong finding when he held that TNBT was used by the appellant (TNB) to 'evade liability' without the benefit of oral evidence.

[54] The particulars of fraud at pp 74–75 of the appeal record at *Jilid* 1 were nothing more than a mere rehash of what the respondents already knew. The respondents knew that TNBT was involved. The respondents registered the award of the arbitrator against TNBT before the High Court. While the appellant — TNB, said that they are not liable for the award against TNBT.

[55] It must be borne in mind that the appellant — TNB, did not pinch assets or remove assets of TNBT. No plea was ever made by the respondents to show that the appellant (TNB) made a representation that the appellant (TNB) will honour the award of the arbitrator. Of crucial importance is this. That the appellant (TNB) did not give an undertaking to the respondents that the appellant (TNB) would honour the award of the arbitrator.

[56] The learned judge of the High Court in his written judgment at p 30 of the appeal record at *Jilid* 1 said that:

> The defendant is not an ordinary corporation. It is recognised as an institution not only by the state but also by the public for whatever essential service it provides. It is pertinent for the defendant at all times to demonstrate good corporate governance, accountability and transparency. The courts will not ordinarily allow such institution to avoid liability by circuitous arguments when the plaintiffs prima facie has an arguable case.

[57] With respect, there is no question of members of the public being involved. And words like 'good corporate governance, accountability and transparency' are not concepts of law.

[58] The respondents knew who were involved in the arbitration proceedings. The High Court seems to think that the appellant (TNB) is hiding behind the skirts of TNBT. These are strong words. But it is not the law.

[59] The High Court relied on *Sunrise Sdn Bhd* but that case has been distinguished by us earlier.

[60] Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by the *Salomon*'s case. We just cannot throw out *Salomon*'s case out of the window and

pretend that it is not there. We are not prepared to depart from the rule in *Salomon*'s case. We are aware of the speech of Lord Denning MR in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners; Same v McGregor (Inspector of Taxes)* [1969] 1 WLR 1241 at p 1254; [1969] 3 All ER 855 at p 860 (CA), where His Lordship said:

> The doctrine laid down in *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.

[61] We categorically say that those who have chosen the benefits of incorporation must bear the rigours of the rule in *Salomon*'s case. And those who deal with a company should likewise be well aware of the rule in *Salomon*'s case.

[62] If the appellant (TNB) is held liable to make payment to the respondents for the award against TNBT then the rule in *Salomon*'s case will be relegated into oblivion. The facts of the present appeal do not permit us to depart from the rule in *Salomon*'s case.

[63] Unless the statute states otherwise, the principle that the separate legal entities with all the rights and liabilities would normally attach to separate legal entities cannot be overlooked. The individuals that form the company and the company itself are separate legal entities.

[64] It is undeniable that the appellant (TNB) is entitled to use the corporate structure of setting up and using TNBT as a subsidiary to enter into a contract. It is perfectly legitimate and nothing sinister can be read into it. Whether it is morally wrong or otherwise is totally immaterial.

[65] We will now examine the issue of estoppel by election. The respondents are estopped from bringing the present action. The respondents had two possible actions in the original suit. The first option was to both defend the original suit and to file a counterclaim against TNBT and the appellant (TNB). The second option was to stay the original suit and refer the matter to arbitration. The respondents elected to proceed with the second option when they filed a stay of the proceedings between them and the appellant (TNB) and in regard to the tussle with TNBT, the respondents decided to refer the dispute to arbitration.

[66] We say that in seeking for the stay, the respondents have elected to affirm the validity of the five agreements. The effect of such an election meant that:

(a) the appellant (TNB) was deprived from proceeding with its cause of action against the respondents in the original suit since the matter was stayed; and

(b) the appellant (TNB) was also deprived of the opportunity to participate in the arbitration proceedings.

[67] Now, the respondents took a different stand. The respondents say that the five agreements were fraudulently procured. In the same breath, the respondents seek to impose the benefits of the final award against the appellant (TNB) who was deprived of the right to argue or participate in the arbitration proceedings. Since there was a breach of the principles of natural justice, the appellant (TNB) submitted that the respondents are now estopped from bringing this action because of their election.

[68] At this juncture, we need to refer to three salient authorities on the subject of estoppel by election. The first would be the case of *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7; [1985] 1 CLJ 20, a decision of the Privy Council. Lord Templeman, delivering the majority judgment of the court made reference to a textbook. At p 11 (MLJ) and p 24 (CLJ), this was what Lord Templeman said:

> In Spencer, Bower and Turner, *The Law Relating to Estoppel by Representation*, (3rd Ed), (1977) para 310 summarises the doctrine of election as applied to the law of estoppel in these terms:
>
> Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

[69] The second would be the case of *Nagubai Ammal & Ors v B Shama Rao & Ors* AIR 1956 SC 593 (SC), a decision of Venkatarama Ayyar J. There at pp 601–602, His Lordship had this to say:

> Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is

that when on the same facts, a person has the right to claim one of two beliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes LJ:

> Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act.

The observations of Scrutton LJ on which the appellants rely are as follows:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: *Ker v Wauchope* (1819) 1 Bli 1 at p 21 (E); *Douglas-Menzies v Umphelby and others* [1908] AC 224 at p 232 (F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in *Halsbury's Laws of England*, Vol XIII at p 454, para 512:

> On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (eg payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it.

The plaintiff obtained no advantage against the appellants by pleading in OS No 92 of 1938–39 that the proceedings in OS No 100 of 1919–20 were collusive; nor did they acting on those pleadings acquire rights to the suit properties. Nor is there any question of election, because the only relief which the plaintiff claimed in OS No 92 of 1938–39 and which he now claims is that he is entitled to the suit properties. Only, the ground on which that relief is claimed is different and, it is true, inconsistent. But the principle of election does not forbid it, and there being no question of estoppel, the plea that the proceedings in OS No 100 of 1919–20 are not collusive is open to the plaintiff.

[70] The third would be the case of *Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd* [1996] MLJU 275; [1998] 3 CLJ Supp 450, a decision of Dato' Abdul Malik bin Ishak while he was sitting on the High Court bench. In that case he spoke of the maxim that a person cannot 'approbate and reprobate' and in doing so he referred to the decision of Venkatarama Ayyar J in *Nagubai Ammal and others v B Sharma Rao and others*. And at p 478 of the report, this was what he said:

> (iii) the plaintiff approbates and reprobates in the following manner. Under examination-in-chief, Mr Tan was referred to the letter from the architect to the defendant dated 2 April 1990 as seen at p 130 of bundle PBD (incidentally this letter was challenged by the defendant) and Mr Tan accepted the contents of this letter as gospel truth. Ironically, Mr Tan refused to accept the letter at p 132 of bundle PBD which bore the same date ie 2 April 1990, and this was the letter from the architect to the plaintiff where the architect itemised the LAD at RM155,648.

[71] Estoppel by election is related to the principle that a person may not approbate and reprobate (*Lissenden v CAV Bosch, Limited* [1940] AC 412 at p 418; [1940] 1 All ER 425 at p 429 (HL)). Thus, a person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile. But the person will not be regarded as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent with his election (*Banque des Marchands de Moscou (Koupetschesky) v Kindersley and another* [1951] Ch 112 at pp 119–120; [1950] 2 All ER 549 at p 552 (CA); *Ex parte Robertson, In re Morton* (1875) LR 20 Eq 733; and *Evans v Bartlam*).

[72] According to Sir Raymond Evershed MR in *Rosenfeld v Newman and others* [1953] 2 All ER 885 at p 887; [1953] 1 WLR 1135 at p 1139 (CA), an election, if it is to be binding, must be clearly and unequivocally made.

[73] In *The King v Taylor, The King v Amendt* [1915] 2 KB 593, a person who had, upon his own application and for his own purposes and profit, obtained a licence and made use of it, was not allowed subsequently to contend that it was void.

[74] In *Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608 (CA), the owners of goods, having elected to treat a delivery of goods by their agent to a wrong consignee as an authorised delivery by suing the consignee for the price of the goods, precluded from suing their agent for misdelivery.

[75] In *Re Fletcher's Settlement Trusts, Medley v Fletcher* [1936] 2 All ER 236 at pp 239–240, a person claiming something under a will is put to his election only if that which is claimed is bounty.

[76] After taking advantage under an order, a party may be precluded from saying that it is invalid and asking to set it aside (*Tinkler v Hilder* (1849) 4 Exch 87 and *Mills v Duckworth* [1938] 1 All ER 318 at p 320 (CA)).

[77] If a person is entitled to one of two inconsistent rights, as opposed to having a choice between two alternative remedies (*United Australia, Limited v Barclays Bank, Limited* [1941] AC 1 at p 29; [1940] 4 All ER 20 at p 37 (HL)) and, with an open mind and with full knowledge he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other (*Slough Estates Ltd v Slough Borough Council and another (No 2)* [1969] 2 Ch 305; [1969] 2 All ER 988 (CA)).

[78] All these are mere examples. And there are many more in the law journals.

[79] Be that as it may, the issue of estoppel by election is further compounded by the fact that the appellant (TNB) had accepted that the dispute was between TNBT and the respondents and that dispute would be determined by arbitration proceedings between those parties only. And if the appellant (TNB) had been alerted or would have known that the appellant (TNB) would be penalised by being asked to pay for the final award of the arbitrator, the appellant (TNB) would have defended itself in the arbitration proceedings. With respect, this point was overlooked by the learned judge of the High Court completely. His Lordship erred when he held the view that the arbitration proceedings were held between the correct parties and he also failed to consider that there was a complete denial of natural justice to the appellant (TNB) as the appellant (TNB) was not a party to the arbitration proceedings.

[80] Since the appellant (TNB) was not a party to the arbitration proceedings, the appellant (TNB) was not present and he did not participate in that proceedings. The appellant (TNB) cannot therefore be asked to pay for the final award handed down by the arbitrator. There was a clear breach of natural justice.

[81] The opportunity to be heard normally calls for an oral hearing and such hearings are modelled along the lines employed by the courts. This was not accorded to the appellant (TNB) for the simple reason that the appellant (TNB) was not a party to the arbitration proceedings.

CONCLUSION

[82] For the reasons adumbrated above, we unanimously allowed the

appellant's (TNB's) appeal with costs of RM10,000. The decision of the learned judge of the High Court was set aside. Deposit to be refunded to the appellant (TNB).

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed